

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NO: A77/2015

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO THE JUDGES: YES/NO
(3) REVISED.

DATE 4/9/2020 SIGNATURE [Signature]

In the matter between:

ALFRED VOSKY RAPHOTLE

APPELLANT

And

THE STATE

RESPONDENT

JUDGMENT

SEMENYA J:

[1] The appellant in this matter was convicted in the magistrate court on a charge of robbery. He was subsequently sentenced to **R4000.00** (four thousand rand) or two (2) years' imprisonment. The trial court dismissed application for leave to appeal to this court. Leave to appeal against conviction and sentence was eventually granted on petition to the Judge President of this Division.

[2] The parties agree, albeit on different grounds, that the appeal against both conviction and sentence should succeed. Counsel for the appellant submitted that the trial court misdirected itself procedurally as well as on the merits. Counsel for the respondent on the other hand contended that the conviction and sentence should be set aside but that the matter should be remitted to the magistrate's court for trial *de novo* before another judicial officer. I am in agreement with counsel for the appellant's contention for the reasons that will appear clearly hereunder.

[3] The conviction of the appellant followed on single evidence of the complainant Samuel Ngobeni. He testified that on the date of the incident he was walking alone in the street when he was accosted by the appellant who struck him with a bottle and robbed him of an amount of **R54.00**. He stated that he did not know the exact time at which the incident occurred but that it was at night. When asked about the state of visibility he stated that it was clear. He could not tell what the source of light came from. He maintained that he and the appellant were neighbours and that he could not mistake him for another person.

[4] Procedural irregularities raised by both counsel came about when the defence attorney indicated that she intends to cross-examine the witness on police statement in view of what she referred to as material discrepancies between his oral evidence and the contents of that statement. It is evident from the record that the trial court was somewhat hostile towards the application made the attorney. The attorney proceeded to ask the complainant few questions clearly with a view of laying the required basis. The complainant admitted that he signed a statement by affixing his thumbprint on it. However, the complainant denied that the statement was read back to him. He stated that the police officer was speaking in Sepedi and that he, the complainant speaks Tsonga. Seeing that the attorney was adamant in wanting to prove that the statement was authentic, the trial court allowed her to lead the evidence of the police officer who obtained it. This happened after the trial court had informed the attorney that he can assure her that a trial within a trial would not take the matter anywhere as it is not going to change what the complainant has said. He reiterated that the procedure of a trial within a trial will simply be a waste of time. The trial court informed the attorney that he has personal experience that police officers just put a stamp on the statement and order people to sign without administering an oath. He stated that he knows this fact as it happened to him on many occasions when he went to the police station to report cases.

[5] Constable Chauke was called to testify in a trial within a trial after the State had closed its case. He testified about the standard procedure that police officers follow when they take witness' statements. He stated that police will use the language that the witness is well conversant with. That the statement will then be read back to the witness who will thereafter append his/her signature on it. He stated that he was speaking to the complainant in Tsonga. He confirmed during cross-examination by the

appellant's attorney that he applied the said procedure on the complainant. When asked by the court as to whether the complainant signed the statement he said yes. The court then showed him a thumbprint on the statement and he confirmed that it was that of the complainant. He apologised for stating that the complainant ad signed the statement.

[6] The complainant was recalled to the witness stand. Before she could cross-examine the witness, the appellant's attorney enquired as to whether the court will allow her to cross-examine him on the contents of the statement. The court stated that it had not yet made a ruling and that cross-examination should be restricted to what the police officer has said. The complainant denied that constable Chauke is the police officer who obtained his statement. He stated that he does not know the officer who obtained his statement as he found many police officers seated around a table. He confirmed that his thumbprint was affixed to a statement and that this happened after he had stated that he is going to tell the truth and the whole truth only. When asked as to where did Chauke get his personal details from, he answered that he might have obtained his statement though he is not certain about it.

[7] At the end of what was referred to as a trial within a trial, the court denied the attorney permission to cross-examine on the statement. The reasons for this ruling as they appear on the record are that the police officer was speaking to the witness in Sepedi while the complainant was speaking in Tsonga. Furthermore, the trial court indicated that the statement was written in broken English. It is evident that in its evaluation of the evidence presented in a trial within a trial, the court erroneously ignored the shortcomings in the answers furnished by the complainant.

[8] It is necessary, in my view, to differentiate between the procedure applied in a criminal trial in order to determine the admissibility of an extra-curial statement made by the accused and that used to authenticate a document. A witness statement is classified as a document which requires authentication before a party to the proceedings can cross-examine on it. The **admissibility** of the evidence contained in a document, as opposed to the **weight** to be attached to evidence contained therein, is determined after a trial within a trial has been held-see **National Director of Public Prosecutions v Viljoen 2005(1) SACR 501 at [41-42]**. Sections 217, 218 and 219A of the Criminal Procedure act 51 of 1977 permits the admissibility of extra-curial statements made by accused persons such as a confession, pointing-outs and informal admissions, provided that certain requirements have been met. However, these sections must be read in conjunction with section 35(5) of the Constitution which provides that evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice. It is common knowledge that almost all extra-curial statements made by accused persons are obtained by the police in the course of investigation of crime. A trial within a trial procedure is a stringent procedure designed to assist the courts in guarding against a conviction of an accused person on the evidence that may have been obtained in violation of the Bill of rights. The police who were involved in the acquisition of the statement will be subjected to cross-examination in order to determine whether the statement was made freely and voluntarily.

[9] The attorney in the present matter informed the court that the version of the appellant differs from what he has told the police. It is evident from that address that cross-examination based on the contents of the statement was intended to discredit the witness. In **S v Tshabalala 1999 (1) SACR 163 (T)** it was held that a witness statement may be used by an accused person for the purposes of cross-examination, subject to the rules of the law of evidence and the admissibility of statements. Whenever a witness' statement is sought to be used during cross-examination, the party who intends to do so shall do so only after it had authenticated such statement. In other words, it must be established that the statement was either written, executed or made by the person who purported to have made it, or was made on his instruction. Some of the common questions asked to authenticate the statement include the language which was spoken by the maker of the statement and police officer who obtained it, whether it was made freely and voluntarily, whether the maker appended a signature or a thumbprint on the statement. The list is not exhaustive.

[10] It appears from the decision in **S v Swanepoel and Another 1980 (2) SA 144 (NC)** that a trial within a trial is not a procedure that should be adopted to authenticate a statement. It was further held in that case that if the statement cannot be authenticated by the person who is purported to be the author, the court should allow the accused in a criminal case to cross-examine the witness on the statement and thereafter admit it provisionally, with a view that he/she will authenticate it when his/her turn to testify comes. It should be remembered that police officers are competent and compellable witnesses who may be called by any party in a criminal case. The accused is at liberty to call a police officer who obtained the witness' statement in order to

authenticate it. Should that happen, the court will finally admit the statement. It is therefore not necessary to go into a trial within a trial solely for the purposes of proving previous inconsistent statement.

[11] The trial court relied on **S v Pitout 2005 (1) SACR 571 (BD)** and **S v Mafaladiso and Others 2003 (1) SACR 583 (SCA)** to preclude the attorney from cross-examining the complainant with a view of proving previous inconsistent statements. It is noticeable that the courts in the two judgments simply referred to the laying of a proper basis before cross-examination can proceed along those lines. It appears clearly that the court did not prescribe that such basis should be laid through a trial within a trial. My view is that the two authorities deal mainly with a proper approach to the evaluation of contradictions that are apparent between the oral evidence tendered in court and the contents of the statement. A step which will follow once the statement has been found to be authentic.

[12] I find that the magistrate's reliance on his personal experiences with regard to the manner in which he was oftentimes treated by the police is irrelevant. Had he wanted to rely on judicial notice of those facts, he would have expressed it in unambiguous terms. The unfortunate remarks he made regarding the said treatment can only point to bias against the police. One may safely conclude that the trial court's attitude towards the application made by the defence attorney was influenced by the knowledge that the procedure will eventually lead to the calling of the police officer who obtained that statement, the evidence he was clearly not prepared to listen to.

Regrettably, the violation of Constable Chauke's right to dignity is so glaringly evident on the face of the record.

[13] The trial court erred in denying the attorney an opportunity to provisionally cross-examine the complainant on the contents of the police statement when it became obvious that it cannot be authenticated through him. This is a material irregularity in that it denied the defence the opportunity to prove that the complainant's version could not be believed. The complainant is a single witness. The cautionary rule is applicable in this instance. It was important to determine whether he is truthful in all material respects and that he did not deviate materially from what he had told the police. It is on this basis that I agree with both counsel that the procedure followed by the trial court was flawed and unfair to the accused.

[14] I shall now turn to the merits of the case. The appellant testified in his defence. He denied the allegation levelled against him. He testified that he was at home on the night of the incident and could not have robbed his next door neighbour. As already stated above, the State's case rested squarely on single evidence of the complainant. It is tried that such evidence must be evaluated with caution as envisaged in **S v Mthethwa 1972 (3) SA 766 (A)** and all other judicial decisions that followed it, more so in that the incident took place at night. In accepting the complainant's version and rejecting that of the appellant, the trial court stated that there can be no mistaken identity in this case as the appellant and the complainant are neighbours and not strangers. He further stated that the incident took place at **19:00**, a fact which is clearly not supported by the facts. The complainant did not want to be specific about the

approximate time at which the incident occurred. He simply testified that the incident took place at night. He made a bold statement that he could see and identify people but could not tell the court the source of the illumination. It would appear that the trial court placed more emphasis on the complainant's version that the appellant is known to be a robber by the community despite the fact that this is inadmissible character evidence. Constable Chauke testified that he is a Tsonga Speaking person. There is no reason why he would decide to speak to the complainant in Sepedi even when he was aware that the complainant was speaking xhiTsonga. The complainant's version in this regard cannot be accepted as the truth, more so in that he was evasive when confronted with the question as to where did the police officer get his personal information from. It is not surprising that he ended up telling the prosecutor that he is no longer interested in proceeding with the trial.

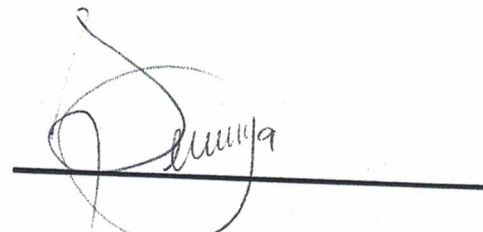
[15] It is indeed so that the duty is on the State to prove the guilt of an accused person beyond reasonable doubt. Whether or not that onus was discharged will depend on the totality of the evidence that was adduced before court. The judgment of the trier of fact should therefore account for all the evidence that came before it-**S v Van Aswagen 2001(2) SACR 97 (SCA)**. It would appear that the trial court convicted the appellant solely on the basis that he and the complainant are neighbours and that he could not have made a mistake regarding identity. This is however not the proper test. The trial court was required to satisfy itself beyond reasonable doubt, not only that the complainant knows the appellant, but further that the appellant is beyond reasonable doubt, the person who robbed him. The complainant's bold statement that the appellant is the person he saw in the dark is less than satisfactory. I find that the trial

court erred in this regard and that this is a proper case where the court of appeal would be justified in interfering with the factual findings of the trial court as they are clearly wrong- **R v Dhlumayo and another 1948 (2) SA 677 (A).**

[16] I am not in agreement with the submissions made by counsel for the respondent that the matter should be remitted to the magistrate's court for trial *de novo*. This is in view of the poor evidence that has been presented during the trial of matter. In any event, the complainant has indicated his unwillingness to proceed with the trial. It is highly unlikely that he will have any interest in testifying again.

[17] Having said so, it shows that the conviction and the sentence imposed by the trial court stands to be set aside. In the result I make the following order:

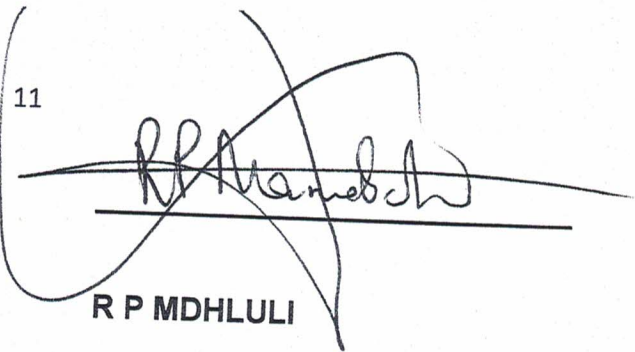
- i. The appeal on conviction and sentence succeeds.
- li The conviction and the resultant sentence are set aside.



M.V SEMENYA

JUDGE OF THE HIGH COURT

I agree



R P MDHLULI

ACTING JUDGE OF THE HIGH
COURT.

APPEARANCES:

ATTORNEYS FOR THE APPELLANT	: LEGAL AID SA.
COUNSEL FOR THE APPELLANT	: ADV. MP LEGODI
ATTORNEYS FOR THE STATE	: DPP POLOKWANE; LIMPOPO
COUNSEL FOR THE STATE	: ADV SITHADA
RESERVED ON	: 07 AUGUST 2020
JUDGMENT DELIVERED ON	: 4 SEPTEMBER 2020